FOR ARGUMENT

No. 77-1806

In the Supreme Court of the United States

OCTOBER TERM, 1978

FORD MOTOR COMPANY (CHICAGO STAMPING PLANT), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 571 F.2d 993. The decision and order of the National Labor Relations Board (Pet. App. A18-A45) are reported at 230 N.L.R.B. 716.

[1] Local 588, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW—the charging party before the Board and an intervenor in the court of appeals—is also a party here.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1978 (Pet. App. A47-A48) following denial of a petition for rehearing on March 23, 1978 (Pet. App. A46). The petition for a writ of certiorari was filed on June 21, 1978, and granted on October 10, 1978 (A. 100). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that prices of food and the food services provided in an employer's in-plant cafeterias and vending machines are mandatory subjects of bargaining under the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Brief for Petitioner, App. A1-A3.

STATEMENT

A. The Board's Findings of Fact [2]

1. Petitioner, Ford Motor Company ("the Company"), operates an automotive parts stamping plant on a one-quarter mile square site, in Chicago Heights,

[2] Many of the relevant facts were stipulated to by the parties (A. 14).

Illinois. The plant employs approximately 3,600 hourly-rated production employees, who work in three shifts (Pet. App. A32; A. 14-16, 18-19, 67). The sole bargaining representative of these employees is the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its administrative component Local 588 (Pet. App. A32; A. 25). The Company and the International Union have been party to a series of national collective bargaining agreements covering employees at the Company's various plants since approximately 1956, when the International was certified by the Board; Local 588 and the Company have, in addition, negotiated a series of supplementary local agreements. The relevant national agreement ran from November 1973 until September 1976, and the relevant local agreement, from June 1974 until September 1976 (Pet. App. A35-A36; A. 17-18, 21-23).

2. The Company provides its employees with two air-conditioned cafeterias and five air-conditioned vending machine areas, called "coke cribs." The main cafeteria, which seats 400 to 500 employees, is open for breakfast, scheduled meal periods, and during shift changes. Hot food from steam tables is available in this cafeteria at breakfast and the scheduled meal periods. In addition, the main cafeteria houses coin-operated vending machines that dispense beverages, hot and cold food, pastry, and candy (Pet. App. A33; A. 20). The other cafeteria, which seats approximately 50 to 100 persons, does not have a steam table and is open only during some of the scheduled

meal periods. It is equipped with two coffee machines and twelve vending machines that dispense a variety of foods. Each "coke crib" also contains a variety of vending machines and is open during all meal and rest periods. Four of these coke cribs have a seating capacity of 40 to 50 persons and one seats 75 to 100 persons (Pet. App. A34; A. 30).

Pursuant to a 1972 agreement with the Company (Pet. App. A32; A. 27-28, 81), ARA Services, Inc. ("ARA"), operates the cafeterias and coke cribs. Under this agreement, ARA furnishes food, machines, management, and personnel (Pet. App. A32-A33). Specifically, section 2(d) of the agreement provides that ARA shall (Pet. App. A19-A20; A. 86):

> furnish products of quality in accordance with purchasing specifications that shall have been submitted to and approved by [the Company], and in accordance with a price and portion list for said manual food service and vending machines that shall have been submitted to [the Company] and that shall be subject to review at the request of [the Company] or [ARA].

The agreement further authorizes the Company to inspect all machines and equipment to determine compliance with established standards of quality and cleanliness (Pet. App. A33; A. 92).

Under section 3(a) of the agreement, the Company must reimburse ARA for all direct costs of the food and vending operations and pay ARA a nine percent

surcharge on net receipts.[3] Should the receipts exceed ARA's costs plus the nine percent surcharge, the Company is entitled to the excess (Pet. App. A20, A33; A. 89-90). Insofar as revenues do not meet the costs of the operation plus the surcharge (as has happened in recent years), the Company is obligated to subsidize ARA up to $52,000 per year (Pet. App. A20, A33; A. 34, 82). The contract is terminable by either party upon 60 days' written notice (Pet. App. A20, A33; A. 93).

All employees have a 30-minute lunch period. In addition, employees who work directly on production lines are afforded a 5-minute washup period before their meals and two 22-minute rest breaks (Pet. App. A34; A. 17). Employees are not permitted to leave the plant building during the break periods, and it is not feasible for them to do so during the short lunch period (Pet. App. A20, A35; A. 40-42). Mobile food vending trucks are not permitted on plant property and are not usually available outside the plant gate (Pet. App. A20, A35; A. 42-43). Some restaurants are located within a four-mile area of the plant, but there are more than a dozen other industrial plants in the same area employing several thousand employees who also have access to those restaurants (Pet. App. A35; A. 15). Thus, a negligible number of employees

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[3] The surcharge consists of a five percent service fee and a four percent allowance for general administrative costs. Net receipts are defined as gross receipts less applicable state and local taxes (A. 89).

(no more than 12 out of 3,600) actually leave the plant during the lunch period (Pet. App. A20; A. 52).

Employees are permitted to bring food into the plant. Such food, which may be eaten only in the cafeterias or coke cribs, must be stored in the employees' lockers and not in working areas (Pet. App. A20-A21, A35; A. 20-21). However, these lockers are located in rooms that are not air-conditioned, and there are no refrigeration facilities available to employees (Pet. App. A21, A35; A. 19, 21, 45). During the summer months, when temperatures frequently range between 80 to 100 degrees, the locker rooms become hot and sticky, and employees have complained about food spoilage (Pet. App. A21, A35; A. 45-47, 49). Moreover, on occasion, the Company has used exterminator services after employees complained about unsanitary conditions in the locker rooms (Pet. App. A21, A35; A. 55, 61).

3. Although the Company has at all times refused to bargain about food prices in its in-plant eating facilities, it has negotiated over food services. Indeed, since 1967 the agreement between the Company and Local 588 has contained specific provisions concerning vending machine and cafeteria services, such as the kinds of food to be provided, the staffing of service lines, adequate cafeteria supervision, the cleanliness of utensils, the restocking and repairing of vending machines, and the provision of additional eating facilities (Pet. App. A20, A36-A39; A. 27, 62-63, 69-73). The 1974 local agreement included the following (Pet. App. A38; A. 73): "The Company

recognizes its continuing responsibility for the satisfactory performance of the caterer and for the expeditious handling of complaints concerned with such performance."

On February 6, 1976, the Company informed Local 588 that cafeteria and vending machine prices would be increased on February 9 by an unspecified amount (Pet. App. A21, A39; A. 31). The Company refused Local 588's request to discuss the increases before they were put into effect, and, on February 9, the prices were increased from 5 to 10 cents per item (Pet. App. A21, A39; A. 31, 50). On February 13, Local President Richard Marco sent a letter to Tom Brown, the Company's industrial relations manager, requesting to bargain regarding food prices and services (Pet. App. A21, A39; A. 74). The letter further stated (Pet. App. A21; A. 74):

> As you know [food prices and services are] a subject of great concern. Good food at reasonable prices is considered to be a condition of employment by our members. If we discuss this promptly, we may be able to reach full agreement prior to opening of negotiations for a new contract.

The Company, by letter dated February 18, denied Local 588's request to bargain, stating that "food prices and services are not a proper subject for negotiations" (Pet. App. A21-A22, A39; A. 77).

On March 23, 1976, Local 588 requested information concerning the Company's role in cafeteria and vending machine operations in order to administer

the existing contract and to prepare for upcoming negotiations (Pet. App. A22, A39; A. 75-76). On April 9, the Company declined to provide the Union with the requested information and again refused to bargain about cafeteria and vending machine prices and services (Pet. App. A39; A. 27). Local 588's several subsequent requests to bargain about food prices and services were also rejected by the Company (*ibid.*).

Meanwhile, on February 16, 1976, Local 588 began a boycott of the food service operations in which substantially more than half of the employees participated (Pet. App. A22, A40; A. 33). The cafeteria boycott ended on May 19, 1976, and the vending machine boycott ended on June 7, 1976 (Pet. App. A40; A. 33). The onset of hot weather, which resulted in the spoilage of food that employees brought from home, and the lack of success in reducing prices led to the cancellation of the boycott (Pet. App. A40; A. 51-52).

B. The Board's Decision and Order

After adopting the factual findings of the administrative law judge summarized above, the Board, disagreeing with the law judge's legal conclusions, held that in-plant cafeteria and vending machine food prices and services constitute "terms and conditions of employment" within the meaning of Section 8(d) of the National Labor Relations Act ("the Act"), 29 U.S.C. 158(d). In particular, the Board found that, despite the Company's acknowledgement of its duty to bargain over at least some aspect of food services,

the Company had completely refused to bargain about both food services and food prices (Pet. App. A24). Because matters falling within the purview of Section 8(d) are subject to mandatory bargaining, the Board concluded that the Company had violated Sections 8(a)(5) and 8(a)(1) of the Act by refusing to supply requested information to, or bargain with, Local 588 regarding food prices and services (Pet. App. A26).

As noted by the Board (Pet. App. A22-A24), this decision adhered to the Board's earlier decisions holding that in-plant food prices are generally a "condition of employment" within the meaning of Section 8(d) of the Act.[4] Although it reaffirmed this broader proposition, the Board also observed that "the instant case, on its facts, is in many respects a stronger case than [*N.L.R.B.* v.] *Ladish* [*Co.*]," 538 F.2d 1267 (7th Cir. 1976), which had previously been decided by the Seventh Circuit contrary to the Board's position (Pet. App. A23 n.11). The Board specifically pointed out the following factors (among others) that were present in this case and absent in *Ladish* (*ibid.*): (1) the Company's "right to review prices

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[4] *Westinghouse Electric Corp.*, 156 N.L.R.B. 1080, 1081 (1966), enf'd *sub nom. Westinghouse Electric Corp.* v. *NLRB*, 369 F.2d 891 (4th Cir. 1966), rev'd *en banc*, 387 F.2d 542 (1967); *McCall Corp.*, 172 N.L.R.B. 540 (1968), enforcement denied *sub nom. McCall Corp.* v. *NLRB*, 432 F.2d 187 (4th Cir. 1970); *Package Machinery Co.*, 191 N.L.R.B. 268 (1971), enforcement denied *sub nom. NLRB* v. *Package Machinery Co.*, 457 F.2d 936 (1st Cir. 1972); *Ladish Co.*, 219 N.L.R.B. 354 (1975), enforcement denied *sub nom. NLRB* v. *Ladish Co.*, 538 F.2d 1267 (7th Cir. 1976).

and its leverage of the subsidy agreement," (2) the possibility of the Company's making a profit on the food service operation, (3) the history of bargaining about some features of cafeteria and vending machine services, (4) the lack of a viable alternative to the in-plant food facilities, and (5) substantial and serious employee concern over in-plant food services and prices as evidenced by the widespread boycott.

The Board ordered the Company, *inter alia*, to bargain with Local 588 upon request "with respect to food services and any changes, now in effect or hereafter made or proposed, in food prices charged employees in the vending machines and cafeterias," and to supply Local 588 "with information necessary for collective-bargaining, in relation to its part or role in the cafeteria and vending machine operations" (Pet. App. A27). In accordance with *Westinghouse Electric Corp.*, 156 N.L.R.B. 1080, 1081 (1966), enf'd *sub nom. Westinghouse Electric Corp.* v. *NLRB*, 369 F.2d 891 (4th Cir. 1966), rev'd *en banc*, 387 F.2d 542 (1967), this order did not require the Company "'to bargain about every proposed price change in food prices before putting such change in effect,' [but rather] * * * to bargain on such price change[s] only after they are determined unilaterally and upon a request of the Union" (Pet. App. A25).

C. The Decision of the Court of Appeals

The court of appeals enforced the Board's order (Pet. App. A1-A17). Although it rejected the general proposition that "in-plant cafeteria and vending machine food prices and services are necessarily" mandatory subjects of bargaining (Pet. App. A9), the court of appeals held "that under the facts and circumstances of this case, in-plant cafeteria and vending machine food prices and services materially and significantly affect and have an impact upon terms and conditions of employment, and therefore are mandatory subjects of bargaining" (Pet. App. A13-A14). On that basis, the court distinguished other cases in which it and other courts of appeals had denied enforcement of Board orders requiring bargaining about in-plant food prices (Pet. App. A14-A17).[5]

SUMMARY OF ARGUMENT

The price of food and the food services that are available to employees at in-plant eating facilities are subjects about which the National Labor Relations Act requires employers and representatives of their employees to bargain collectively. Sections 8(d), 8(a)(5) and 9(a) impose a duty upon an employer to bargain about "terms and conditions of employment." Since that phrase, which is found in Section 8(d), encompasses "the various physical dimensions of [an employee's] working environment," *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring), all substantial aspects of in-plant eating facilities, including food prices, fall well within the ordinary meaning of Section 8(d).

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[5] See note 4, *supra*.

Petitioner's attempt to minimize the importance to employees of in-plant food prices is both factually inapplicable and legally erroneous. In light of an employee's need for food and drink during the course of an eight-hour work day, the Board, whose determination of the scope of Section 8(d) is entitled to great deference, has consistently found that the availability of in-plant food at reasonable prices is an important aspect of an employee's working environment. That conclusion is especially warranted in the instant case where the Company's employees of necessity eat in petitioner's in-plant facilities. Moreover, the Company's employees felt sufficiently aggrieved by the raising of food prices here that they engaged in a large-scale boycott for several months.

Furthermore, an employer cannot avoid mandatory bargaining over the "terms and conditions of employment" merely because the particular terms or conditions may be subject to seemingly minor changes that can otherwise be compensated for. Any change in a company-sponsored health insurance program, for example, is subject to mandatory bargaining on request. An employer's obligation to bargain about in-plant food prices and services is similarly comprehensive, but, as the Board's order reflects, this does not mean that the Company ordinarily will have to bargain about insignificant matters. Instead, it has been ordered to bargain only if the Union so requests following the Company's making of unilateral changes in food prices. Such subjects can also be dealt with in a comprehensive manner in collective agreements.

Common industrial practice is consistent with the Board's conclusion that the prices of food and food services available to employees in an in-plant eating facility are mandatory subjects of bargaining. Many collective bargaining agreements have explicit or implicit provisions concerning food services and prices in in-plant eating facilities. Indeed, since 1967 the Company and Local 588 have included many detailed provisions regarding in-plant food services in their collective bargaining agreement. In addition, management often considers subsidized in-plant facilities, such as those at issue here, to be a major benefit for both employees and employers.

Both the legislative history and the policies of the National Labor Relations Act strongly support the Board's determination here that Congress intended to subject a large spectrum of matters to mandatory bargaining by using the broad phrase "terms and conditions of employment." In keeping with this Court's decisions, the Board in applying Section 8(d) has remained faithful to the Act's strong policy in favor of collective bargaining as a means of resolving industrial disputes. Indeed, the potential for industrial strife arising out of in-plant food facility disputes is highlighted by the wide scale food boycott that occurred here. Concomitantly, in-plant food services and prices do not involve "managerial decisions, which lie at the core of entrepreneurial control." *Fibreboard Paper Products Corp.* v. *NLRB*, *supra*, 379 U.S. at 223.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT PRICES OF FOOD AND THE FOOD SERVICES PROVIDED IN AN EMPLOYER'S IN-PLANT FOOD FACILITIES FOR ITS EMPLOYEES ARE MANDATORY SUBJECTS OF BARGAINING UNDER THE NATIONAL LABOR RELATIONS ACT

A. The Board Has Correctly Found That In-Plant Food Prices and Services Fall Well Within the Ordinary Meaning of "Terms and Conditions of Employment"

1. As originally enacted, the National Labor Relations Act did not directly specify the subjects about which employers and unions must bargain. Section 8(a)(5) of the Act, now codified at 29 U.S.C. 158 (a)(5), simply declares it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 49 Stat. 453. Section 9(a), in turn, provides that a union selected by a majority of the bargaining unit shall be the collective bargaining representative "in respect to rates of pay, wages, hours of employment, or other conditions of employment." *Ibid.* (now codified at 29 U.S.C. 159(a)).

Section 8(d) of the Act, which is the focal point of this case, was added to the Act in 1947 by the Taft-Hartley Amendments. 61 Stat. 142 (now codified at 29 U.S.C. 158(d)). This provision, using language essentially parallel to that found in Section 9(a), made explicit what was implicit in the original Act:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment * * *.

Read together, the foregoing provisions of the Act "establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment * * *.' The duty is limited to those subjects, and within that area neither party is legally obligated to yield. * * * As to other matters, however, each party is free to bargain or not to bargain * * *." *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 210 (1964), quoting *NLRB* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

2. This case primarily involves the construction and application of the phrase "terms and conditions of employment" as used in Section 8(d). The broad language of that provision encompasses, at a minimum, all "issues that settle an aspect of the relationship between the employer and employees." *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971). Accord, *NLRB* v. *Wooster Division of Borg-Warner Corp.*, *supra*, 356 U.S. at 350; *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 294 (1959). While the sweep of Section 8(d) is not unlimited, certainly "the various physical dimensions of [an employee's] working environment" constitute "terms and conditions of employment." *Fibreboard Paper Products*

Corp. v. *NLRB*, *supra*, 379 U.S. at 222 (Stewart, J., concurring).

Although it acknowledges that many aspects of in-plant food services are covered by Section 8(d) (Pet. App. A20, A36-A37; A. 27, 62-63, 69-73),[6] petitioner nonetheless contends that in-plant food prices are not mandatory subjects of labor-management negotiations. But no employee can be expected to work a full eight-hour day without stopping to eat. Given the necessity of eating, food availability is no less germane to the employees' working environment than plant air temperature and quality, restroom privileges and conditions, or employee rental of company-owned housing—all of which are subject to mandatory bargaining.[7] For that reason, manage-

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[6] The concession is well warranted. The Company, as is common for many employers in many different industries, has bargained about many aspects of its in-plant food services since 1967 (*e.g.*, Pet. App. A20, A36-A37). See, *e.g.*, BNA, 2 *Collective Bargaining (Negotiations and Contracts)* 95:421-424, 441-444 (1978). In addition, the courts of appeals have uniformly found such matters to constitute "terms and conditions of employment." See, *e.g.*, *NLRB* v. *Ladish Co.*, *supra*, 538 F.2d at 1272; *International Union, UAW* v. *NLRB*, 392 F.2d 801, 804, 806 (D.C. Cir. 1967), cert. denied, 392 U.S. 906 (1968); *Inland Steel* v. *NLRB*, 170 F.2d 247, 251 (7th Cir. 1948), cert. denied in relevant part, 336 U.S. 960 (1949), aff'd on other grounds *sub nom. American Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950). See also *Bralco Metals, Inc.*, 214 N.L.R.B. 143, 146-150 (1974); *Hasty Print, Inc., d/b/a Walker Color Graphics*, 227 N.L.R.B. 455, 461 (1976).

[7] See, *e.g.*, *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 15 (1962) (air temperature); Comment, *A Case for Air Pollution as a Mandatory Bargaining Subject*, 51 Ore. L. Rev. 223 (1971); *American Smelting and Refining Co.* v. *NLRB*, 406 F.2d 552 (9th Cir.), cert. denied, 395 U.S. 935 (1969) (company housing); *NLRB* v. *Lehigh Portland Cement Co.*, 205 F.2d 821 (4th Cir. 1953) (company housing); *Pennco, Inc.*, 212 N.L.R.B. 677, 682-683 (1974), and *Preston Products Co.*, 158 N.L.R.B. 322, 344-345 (1966), aff'd in relevant part, 392 F.2d 801 (D.C. Cir. 1967), cert. denied, 392 U.S. 906 (1968) (restrooms). See also *NLRB* v. *Gulf Power Co.*, 384 F.2d 822 (5th Cir. 1967) (safety and health rules); *S.S. Kresge Co.* v. *NLRB*, 416 F.2d 1225, 1229-1230 (6th Cir. 1969) (employee dress and smoking); *Bralco Metals, Inc.*, 214 N.L.R.B. 143, 146-150 (1974) (personal telephone calls).

ment must bargain about meal hours and coffee breaks even if no in-plant facilities exist.[8] And where, as here, the employer has chosen to establish in-plant eating facilities for the employee's use, the employer must also bargain about all aspects of the use of those facilities, and the services provided in them, including improvement in lunchroom equipment and supplies,[9] coffee break scheduling and service of free coffee,[10] free meal policy,[11] cancellation of catering truck

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[8] See, *e.g.*, *Fibreboard*, *supra*, 379 U.S. at 222; *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 691 (1965); *NLRB* v. *Ladish Co.*, *supra*, 538 F.2d at 1272; *Missourian Publishing Co.*, 216 N.L.R.B. 175, 180 (1975); *D & C Textile Corp.*, 189 N.L.R.B. 769, 771, 783 (1971); *Fleming Manufacturing Co.*, 119 N.L.R.B. 452, 455 (1957).

[9] *Preston Products Co.*, 158 N.L.R.B. 322 (1966), aff'd in relevant part, 392 F.2d 801 (D.C. Cir. 1967), cert. denied, 392 U.S. 906 (1968).

[10] *Missourian Publishing Co.*, 216 N.L.R.B. 175, 180 (1975); *Fleming Manufacturing Co.*, 119 N.L.R.B. 452 (1957).

[11] *O'Land, Inc., d/b/a Ramada Inn South*, 206 N.L.R.B. 210, 214-215 (1973).

service,[12] meal areas,[13] cleanup of lunchroom areas by employees [14] and, we submit, the prices of the food served.

Petitioner is not in the business of selling food to its employees, and it cannot realistically be claimed that in-plant food prices involve "managerial decisions, which lie at the core of entrepreneurial control." *Fibreboard, supra,* 379 U.S. at 223 (Stewart, J., concurring). Rather, those prices, like the economic aspects of employee use of other in-plant facilities—such as fees or charges, if any, for lockers, pay toilets, or parking accommodations—are as much a subject of the mandatory bargaining obligation as their physical attributes. It is, after all, especially with respect to economic disputes between labor and management that the Act was intended to substitute the bargaining process for work disruptions that might otherwise ensue (see point C, *infra*).

In addition, the right to negotiate about in-plant food services could be rendered nugatory if the employees' representatives were unable to discuss the price of the food that is provided. For example, negotiations over the cleanliness and variety of selections available at an in-plant cafeteria would not be meaningful if the employer were free unilaterally to raise cafeteria prices to prohibitively expensive levels

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[12] *Bralco Metals, Inc.,* 214 N.L.R.B. 143, 146-150 (1974).

[13] *Hasty Print, Inc., d/b/a Walker Color Graphics,* 227 N.L.R.B. 455, 461 (1976).

[14] *Cosmo Graphics, Inc.,* 217 N.L.R.B. 1061 (1975).

without any obligation subsequently to bargain about the price in good faith at the union's request. In sum, it is whether desirable in-plant food is available at reasonable prices that constitutes a condition or term of employment.[15]

3. Petitioner attempts to avoid the plain thrust of Section 8(d) by belittling the importance of in-plant food prices to employees. Even if petitioner's characterization of this issue is correct, however, the Company must still bargain over changes in food prices if the employees' bargaining representative so desires.[16] While an employer's decision to raise the

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[15] Ordinarily, when a matter is subject to mandatory bargaining, all of its facets are subject to negotiation. For example, mandatory bargaining over health insurance involves not only whether insurance will be provided, but also the extent, cost of coverage, and any other pertinent matter affecting employee benefits. See, *e.g., Bastian-Blessing, Div. of Golconda Corp.* v. *NLRB,* 474 F.2d 49, 54 (6th Cir. 1973); *Oil, Chemical & Atomic Workers Int'l Union* v. *NLRB,* 547 F.2d 575, 582 & n.6 (D.C. Cir. 1977).

[16] Since the Board's order allows the Company unilaterally to effect price changes and those changes will result in labor-management bargaining only if the union subsequently requests to negotiate, truly *de minimis* matters presumably will not have to be discussed. Furthermore, an employer and union could structure their bargaining relationships regarding food prices to avoid repeated negotiations by, for example, placing a ceiling on price increases allowable during a particular time period. Petitioner's assertion that the Board's position will lead to "endless rounds of negotiation" (Br. 28) is thus baseless. In any event, the Act reflects Congress's judgment that negotiations are preferred to industrial strife and that the latter may arise from seemingly minor complaints about a condition of employment as well as from a major issue such as wages.

annual employee contribution to the cost of health insurance by a few cents would only marginally affect the employees, it is beyond cavil that such a decision is subject to mandatory bargaining. Similarly, the fact that the increased cost of in-plant food or health insurance could be offset by an increase in wages or a cost of living adjustment clause does not place those terms or conditions of employment beyond the purview of Section 8(d). In short, that a term or condition of employment is subject to minor changes that are arguably compensable by increased wages does not somehow erase the duty to bargain.[17]

Furthermore, petitioner's characterization of the importance of in-plant food prices is inaccurate. A small increase in food prices is substantial when viewed over a period of time. For example, if the price of all food items provided in an in-plant food facility were increased by ten cents, a worker who purchases an average of four items per day (such as one or two beverages and two or three food items in an eight-hour work day) would pay an additional eight dollars for food in a month with 20 work days and an additional $88 in a year in which he worked 220 days. These figures are comparable to an increase of eight dollars per month in employee health cost payments or the cessation of a regular $75-$100

[17] Nor is there merit in petitioner's assertion (Br. at 26) that an increase in the prices of food available in its in-plant facilities is no different from an increase in prices at the local food store. Health insurance is also available outside of the employment relationship, but an increase in the cost to employees of employer-supplied insurance is clearly subject to mandatory bargaining.

Christmas bonus—matters that are clearly subject to mandatory bargaining. *E.g.*, *NLRB* v. *Citizens Hotel Co.*, 326 F.2d 501 (5th Cir. 1964); *NLRB* v. *Niles-Bement-Pond Co.*, 199 F.2d 713 (2d Cir. 1952); *W. W. Cross & Co.* v. *NLRB*, 174 F.2d 875 (1st Cir. 1949).[18]

Petitioner also seeks (Br. 31-32) to avoid the plain terms of Section 8(d) on the ground that the existence of an alternative ("brown bagging") to the cafeterias and coke cribs precludes classifying in-plant food prices as a term or condition of employment. This contention is both factually inapplicable and legally erroneous. Both the Board and the court of appeals found that "brown bagging" was not a viable alternative because the employees' lockers were often too hot and occasionally vermin infested (Pet. App. A16-A17, A23 n.11). Such a concurrent factual finding is ordinarily not reviewed by this Court. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). In any event, not every member of a bargaining unit must avail himself of a benefit in order for that benefit to be a mandatory subject

[18] The effect of in-plant price increases is particularly apparent in the instant case. Since virtually all employees must eat in the in-plant facilities and since the employees' lockers are often unsuited to the storage of food, the Company has a captive market. The importance of in-plant food prices is further reflected in the mass employee boycott that occurred here. Indeed, as a general matter, in-plant food prices and services may well be of intense interest to employees who value highly the scheduled breaks from what may otherwise be a dull work routine.

of bargaining. See, *e.g.*, *Richfield Oil Corp.*, 110 N.L.R.B. 356 (1954), enf'd, 231 F.2d 717 (D.C. Cir.), cert. denied, 351 U.S. 909 (1956) (optional stock purchase plan); *NLRB* v. *Lehigh Portland Cement Co.*, 205 F.2d 821, 823 (4th Cir. 1953) (only 25% of employees rented employer housing).[19]

4. In light of the important role of readily available in-plant food services at reasonable prices in the overall working environment of employees, the Board and the court of appeals correctly concluded that petitioner had violated Section 8(a)(5) by refusing to bargain.[20] The Board's determination that in-plant food prices and services are terms and conditions of employment adheres to more than ten years of consistent precedent.[21] Because the "classification of bar-

[19] The *Amicus Curiae* Brief On Behalf of the National Automatic Merchandising Association suggests that the Board's decision unduly interferes with the third party relationship between the employer and the independent in-plant food facility managers and suppliers. In this case, however, the Company retained the power to control and review food services and prices. Where the employer does not have such explicit power, he can nonetheless seek to affect prices by, *inter alia*, initiating or increasing a subsidy to the food caterer. We further note that many employee benefits, such as health insurance, involve third-party suppliers.

[20] As previously indicated, the Board found (and the court of appeals agreed) that the Company had refused to negotiate about both food services and food prices (Pet. App. A24; see Pet. App. A21-A22, A39; A. 77).

[21] In addition to the authorities cited in note 4, *supra*, see also *Weyerhaeuser Timber Co.*, 87 N.L.R.B. 672 (1949); *O'Land, Inc., d/b/a Ramada Inn South*, 206 N.L.R.B. 210, 215-216 (1973); *Missourian Publishing Co.*, 216 N.L.R.B. 175, 180 (1975); *Florida Steel Corp.*, 231 N.L.R.B. 923 (1977).

gaining subjects as 'terms or conditions of employment' is a matter concerning which the Board has special expertise," *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 685-686 (1965), the Board's determination here is entitled to great deference. Cf. *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 302-304 (1977).[22]

B. Established Industrial Practices Show That In-Plant Food Services and Prices are "Terms and Conditions of Employment"

This Court has repeatedly approved the propriety of looking to industrial practices as an aid in determining the scope of Section 8(d). See, *e.g.*, *Fibreboard, supra*, 379 U.S. at 203. The inclusion of provisions relating to in-plant food services and prices in collective bargaining agreements is a widespread practice in a substantial range of industries. See

[22] Although we argue primarily that in-plant food prices are "terms and conditions of employment," we submit that such matters are also "wages" within the purview of Section 8(d). In *Weyerhaeuser Timber Co.*, 87 N.L.R.B. 672, 676 (1949), the Board held that meals served to employees at a remote timber camp constituted "wages" (as well as "conditions of employment"). The Board reasoned that the meals represented an "emolument of value" to the employees because they saved both on the cost of transportation to obtain food and on the cost of the food itself since the meals were sold below cost. Cf. *W. W. Cross & Co., Inc.* v. *NLRB*, 174 F.2d 875, 878 (1st Cir. 1949). The same analysis applies to food services furnished by, and at, an industrial plant. As highlighted by the facts of this case, the in-plant meals represent "emoluments of value" in terms of transportation expenses, insofar as alternative sources of food are relatively distant, and meal costs, insofar as the Company has subsidized ARA.

BNA, 2 *Collective Bargaining (Negotiations and Contracts)* 95:421-424, 441-444 (1978);[23] see also note 24, *infra*. Indeed, since 1967 the local agreements between petitioner and Local 588 have contained detailed provisions regarding in-plant food services (Pet. App. A20, A36-A39; A. 27, 62-63, 69-73). In addition, numerous arbitration decisions have construed collective bargaining agreements to cover the cost of employer-supplied food as a condition of employment.[24]

That management commonly considers the provision of in-plant food to be "one of the most important

[23] As petitioner points out (Br. at 29), none of the few sample clauses from collective bargaining agreements reproduced in this study refer to in-plant food prices directly, although several refer to the distribution of canteen profits to the union. Such clauses apparently exist, however, see S. Torff, *Collective Bargaining: Negotiations and Agreements* 279 (1953), especially in unpublished local agreements. Moreover, the duty of management to negotiate about at least some aspects of food services (which petitioner has conceded, Pet. App. A24) confirms the duty to negotiate over food prices. The right to negotiate over food services can be rendered illusory if management can raise prices at will. It is whether desirable food is available at reasonable prices that constitutes a condition of employment.

[24] See, *e.g.*, *Universal Form Clamp Co.*, 68 Lab. Arb. Rep. 1223 (Miller, 1977) (cost of coffee); *Hilton Hotels Corp.*, 42 Lab. Arb. Rep. 1267, 1270-1272 (Hanlon, 1964) (cost and type of meals); *Greater Los Angeles Zoo Ass'n*, 60 Lab. Arb. Rep. 838 (Christopher, 1973) (employer may not discontinue practice of providing free meals to zoo food vendors when contract provided that there would be no reduction of employee benefits); *Alpena General Hospital*, 50 Lab. Arb. Rep. 48 (Jones, 1967), and *Lutheran Medical Center*, 44 Lab. Arb. Rep. 107 (Wolf, 1964) (free meals are working condition).

employee benefits" further evidences the correctness of the Board's determination here.[25] In addition to being a convenient mechanism for supplying necessary meals while allowing employees to fraternize with their fellow workers,[26] in-plant food services are considered by management to benefit employees in numerous other ways such as providing better nutrition and nutrition education.[27] Such employee benefits are enhanced by the availability of reasonable, or subsidized, meals.[28] Management, in turn, also derives a number of advantages from in-plant food facilities: increased employee morale and productivity, reduced employee absenteeism and tardiness, the ability to schedule shorter lunch hours and coffee breaks, and the greater ability to recruit new employees.[29]

[25] Fisher, *Operating Your Firm's Dining Area Profitably*, 27 Administrative Management 66-67 (Oct. 1966).

[26] See Scheer, *The Company Cafeteria*, 45 Personnel Journal 85-86 (1966).

[27] See W. Waite, *Personnel Administration* 578 (1952); T. Toedt, L. Lovejoy, R. Story and D. Shainin, *Managing Manpower in the Industrial Environment* 550 (1962).

[28] See Scheer, *The Company Cafeteria, supra;* J. Mee, *Personnel Handbook* 577-579 (1951); T. Toedt, L. Lovejoy, R. Story and D. Shainan, *Managing Manpower, supra*, at 548-550; *Lunching at the Office: Four Plans*, 28 Administrative Management 32 (1967). See also *Westinghouse Electric Corp.* v. *NLRB, supra*, 369 F.2d at 894.

[29] See, *e.g.*, Dana, *In-House Food Services Can Increase Morale and Productivity*, 52 Personnel Journal 50-53 (1973); BNA, *Labor Policy and Practice Series (Personnel Management)*, 241:16 (1978); *McCall Corporation, supra*, 172 N.L.R.B. at 546 n.30. See also notes 25-28, *supra*.

Thus, many employers choose to provide in-plant food services for their employees, and a substantial portion of these food operations are employer-subsidized.[30] These in-plant facilities are both an integral part of the employees' working environment and a significant employee benefit. In light of the common industrial practice of providing for, and bargaining about, such food operations, the Board has reasonably concluded that in-plant food prices and services are conditions and terms of employment.

C. The Legislative History and Statutory Purposes of the National Labor Relations Act Support the Board's Conclusion That In-Plant Food Prices Are Subject to Mandatory Bargaining

1. The relevant legislative history indicates that in enacting Section 8(d) Congress intended to sub-

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[30] Petitioner is contractually obligated to subsidize ARA up to $52,000 per year, which it has done in recent years (Pet. App. A20, A33; A. 34, 82). Moreover, a recent survey conducted through the Bureau of National Affairs' Personnel Policies Forum showed that 54 percent of the responding companies provided food services using a lunchroom with vending machines; 43% of the companies provided employee cafeterias, and 15% provided vending machines with snack bar service. BNA, *Labor Policy and Practice Series, supra*, at 245: 201-204. Surveys published by the National Industrial Conference Board in 1964 showed that 47% of the manufacturing companies that responded provided cafeteria services, and 55% of the companies with cafeterias subsidized the operation. Only 8% of the companies reported that they were trying to operate the cafeterias at a profit. NICB, *Personnel Practices in Factory and Office: Manufacturing*, Personnel Policy Study No. 194 at 76-77 (1964). For data on food services in nonmanufacturing companies, see NICB, *Office Personnel Practices: Nonmanufacturing*, Personnel Policy Study No. 197 (1965).

ject a wide range of matters to mandatory bargaining. The original House bill had sought to curtail the scope of labor-management negotiations by specifically listing the limited topics subject to mandatory bargaining. H.R. 3020, 80th Cong., 1st Sess., § 2(11) (1947); H.R. Rep. No. 245, 80th Cong., 1st Sess. 22-23, 49 (1947). However, the Senate, guided by the comments of then NLRB Chairman Paul Herzog,[31] adopted the broader and more general language now found in Section 8(d), thereby deferring to the Board's expertise in these matters.

In conference, the House's attempt to "straight jacket[]" and "limit narrowly the subject matters appropriate for collective bargaining," H.R. Rep. No. 245, *supra*, at 71 (Minority Report authored by then Rep. John F. Kennedy), was rejected in favor of the Senate version. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 8, 34 (1947); 93 Cong. Rec. 6444 (1947) (summary report of Sen. Taft); *id.* at 6529 (remarks of Sen. Kilgore).[32] Congress thus apparently foresaw that the scope of collective bargaining

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[31] See *Hearings on S. 55 and S.J. Res. 22 Before the Senate Comm. on Labor and Public Welfare*, 80th Cong., 1st Sess. 1914 (1947).

[32] The Company claims (Br. 22) that, despite the broad language of Section 8(d) as enacted, Congress intended to retain the restrictive approach of the House bill. But, as Mr. Justice Stewart has pointed out, the isolated language in the House Conference Report that petitioner relies upon refers to the similarity between the two bills in terms of collective bargaining procedures, not the scope of collective bargaining. *Fibreboard, supra*, 379 U.S. at 221 n.5 (concurring opinion).

might "vary with changes in industrial structure and practice," and therefore chose to leave the precise details of what constituted a term or condition of employment to the discretion of the Board. See *Hearings Before the Senate Comm. on Labor*, note 31, *supra*. Here, the Board, consistently with this legislative history, has reasonably concluded that in-plant food prices and services are mandatory subjects of bargaining.

2. Similarly, the Board's determination here effectuates a primary policy of the National Labor Relations Act. The Act's sponsors recognized that refusals to bargain and negotiate had been a major cause of industrial strife. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42-43 (1937). Thus, a principal purpose of the Act is to promote the peaceful settlement of industrial disputes and labor-management controversies through the collective bargaining process. See *Fibreboard, supra*, 379 U.S. at 211; Section 1(b) of the Act, 29 U.S.C. 151(b). As Judge Craven, writing for the panel in *Westinghouse Electric Corp.* v. *NLRB*, *supra*, 369 F.2d at 895, stated:

> The underlying philosophy of the Labor Act is that discussion of issues between labor and management serves as a valuable prophylactic by removing grievances, real or fancied, and tends to improve and stabilize labor relations. Experience teaches that major work interruptions may spring from seemingly trivial causes.

The Board's inclusion of in-plant food prices and services within the statutory scope of mandatory

bargaining thus effectuates the policies of the Act. As epitomized by the large-scale boycott involved in this case, relegating disputes over in-plant food matters to the collective bargaining process serves to bring "a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace." *Fibreboard, supra.*

While petitioner contends (Br. 27-28) that the policies of the Act do not require in-plant food prices to be a topic of mandatory bargaining, it acknowledges that it must bargain over the inextricably interlinked issue of food services.[33] Indeed, since 1967 the collective bargaining agreements between petitioner and Local 588 have contained various detailed provisions concerning the in-plant food services (Pet. App. A20, A36-A37; A. 27, 62-63, 69-73), and petitioner does not claim that the negotiations underlying those provisions were either unduly burdensome or interfered with "managerial decisions, which lie at the core of entrepreneurial control." *Fibreboard,*

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[33] With respect to food services, petitioner merely contends (Br. 35-36) that the Board's order does not define with reasonable specificity the food service matters on which bargaining is required. Since petitioner did not raise this issue before the Board or the court of appeals—contending only that it did not refuse to bargain about food services—it is foreclosed from raising it here. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, the elements of the term "food services" have already largely been defined by the Company's prior bargaining and by the Board and court decisions on this subject. See notes 9-14, *supra*. The content of the term can be further fleshed out in the course of subsequent negotiations with Local 588.

supra, 379 U.S. at 223. Rather, given the importance of in-plant food matters to the working environment of employees[34] and the interlocked nature of food services and food prices,[35] the Board's determination below properly furthers the statutory policy of avoiding industrial strife by means of labor-management negotiations.

D. The Board's Determination That In-Plant Food Prices Are "Terms and Conditions of Employment" is Consistent With This Court's Prior Decisions

Although this Court has never directly addressed the issue whether in-plant food matters are mandatory subjects of bargaining, an analysis of the Court's most relevant decisions supports the propriety of the Board's conclusion here. In a concurring opinion in *Fibreboard*, *supra*, three Justices stated that Section 8(d) at least includes "the various physical dimensions of [an employee's] working environment."

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[34] In-plant facilities generally have a substantial impact upon the employees' working environment. See, *e.g.*, *Ladish Co.*, *supra*, 219 N.L.R.B. at 357 & n.26 (citing *Preston Products Co.*, 158 N.L.R.B. 322 (1966), rev'd on other grounds, 373 F.2d 671 (D.C. Cir. 1967), and various industrial relations surveys). This conclusion is buttressed by the importance that management attributes to this "employee benefit" and management's willingness to subsidize such facilities. See pages 24-26, *supra*.

As previously noted, the facts of this case are particularly compelling. Virtually every Company employee eats in the plant because of the short lunch hour and the lack of alternatives in the plant area, and because the employee locker area is unsuitable for food storage.

[35] See pages 18-19, *supra*.

379 U.S. at 222. Other decisions of this Court have recognized that the physical dimensions of an employee's milieu, in turn, include air temperature[36] and the particular hours of the day during which employees shall be required to work (and the times for eating breaks).[37]

Petitioner, relying on *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, *supra*, 404 U.S. at 176, claims (Br. 23-27) that the Board has erred because in-plant food prices do not "vitally affect[] the 'terms and conditions of employment.'" We have shown, however, that in-plant food prices are an integral and important part of an employee's working conditions. See pages 16-19, 24-26, *supra*. Moreover, petitioner's reliance upon the "vitally affect" standard in *Allied Chemical*, *supra*, is misplaced. That case involved the question whether retired employees' pension benefits, which are not terms and conditions of the employment of current employees, nonetheless fall within the purview of Section 8(d) because such benefits "vitally affect" the terms and conditions of current workers. Thus, the "vitally affect" standard has been used by this Court when the matter in issue directly involves individuals outside the employer-employee relationship and only indirectly bears upon that relationship. See also *Local 24, International Brotherhood of Teamsters*

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[36] See *NLRB* v. *Washington Aluminum Co.*, *supra*.

[37] See *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, *supra*, 381 U.S. at 691; see also *Fibreboard*, *supra* ("what periods of relief are available").

v. *Oliver, supra.* Here, by contrast, in-plant food prices, which are controlled and subsidized by the Company, directly affect, and are a condition of, the employment relationship.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 285252 280